88-1095

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC.
d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

JURISDICTIONAL STATEMENT

PAUL G. REES, JR., ESQ.
510 East Limberlost
Tucson, Arizona 85705
(602) 293-9066

WILLIAM T. RIUTALA, ESQ.
ROBERT A. REES, ESQ.
Counsel of Record

RINTALA, SMOOT, JAENICKE & BRUNSWICK

Suite 400
10351 Santa Monica Boulevard
Los Angeles, California 90025
(213) 203-0935

Attorneys for Appellants

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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QUESTIONS PRESENTED

1. Whether California Business & Professions Code Sections 25602 and 25602.1 violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by allowing to a criminal minor a cause of action against a licensed provider of alcohol while denying such a cause of action to an innocent minor.

2. Whether California Business & Professions Code Section 25602(b) violates the equal protection clause of the Constitution of the United States by providing to one class of citizens, namely licensed providers of alcohol, a civil immunity for their criminal acts.

3. Whether California Business & Professions Code Section 25602(c) and Civil Code Section 1714(b) violate the

due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution by establishing an irrebuttable presumption that the service of alcohol cannot cause injury to a third party even though the presumption is not universally true and the state has reasonable alternative means of making an individualized determination of causation.*

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* Appellants, the Honorable Joseph Howe and Doris Louise Howe, are Arizona residents and were plaintiffs in the trial court and appellants in the Court of Appeal. Appellees Norchek of Newport, Inc. d/b/a Woody's Wharf ("Norcheck") and Robert Kinney are California residents and were defendants in the trial court and appellees in the Court of Appeal. The City of Newport of Beach and State of California were defendants in the trial court but were not involved in the appeal below.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

v.

NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,
Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF
CALIFORNIA

JURISDICTIONAL STATEMENT

Appellants, the Honorable Joseph Howe and Doris Louise Howe, appeal from the final judgment of the Court of

Appeal of California, dated July 5, 1988, holding that California Business & Professions Code Sections 25602 and 25602.1 and California Civil Code Section 1714(b), as applied in this case, do not violate appellants' rights to equal protection and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal of California is not officially reported; it appears as Appendix A hereto. The order of the Superior Court from which the appeal was taken appears as Appendix B. The order of the Supreme Court of California denying appellants' petition for review appears as Appendix C.

JURISDICTION

The California Court of Appeal on July 5, 1988 filed its opinion upholding the constitutionality of the challenged statutes against appellants' claims that these statutes violated their rights under the Fifth and Fourteenth Amendments. On September 21, 1988, the Supreme Court of California denied appellants' petition for review. On November 30, 1988 appellants filed a notice of appeal in the Court of Appeal of California, a copy of which appears as Appendix D.

This appeal is being docketed in this Court within ninety days from the denial of appellants' petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Fourteenth Amendments of the United States Constitution; California Business & Professions Code §§25602 and 25602.1; and California Civil Code §1714(b). These constitutional and statutory provisions are set forth in Appendix E.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceedings below, in opposition to appellees' demurrers to appellants' complaint and first amended complaint, appellants raised the claim that California Business & Professions Code §25602(b) violated the equal protection clause because it discriminated against victims of crimes and did not protect all minors equally.

At the same time, appellants argued that Business & Professions Code §25602(c) and California Civil Code Section 1714(b) violated the due process clauses of the Fifth and Fourteenth Amendments because they impermissibly created an irrebuttable presumption on the issue of causation. Appellees' demurrer to the first amended complaint was sustained without leave to amend. [Appendix B.]

Appellants restated their claims under the Fifth and Fourteenth Amendments before the Court of Appeal which considered and rejected the constitutional claims. [Appendix A, pp. A-23 to A-27.]

STATEMENT OF THE CASE

At the time of his death, appellants' son, Joseph Bradford Howe

("Joey"), was twenty years old, in good health and regularly employed. Appellee Norchek was engaged in the business of selling alcohol to the general public at Woody's Wharf, a Newport Beach bar. Appellee Kinney was a bartender at Woody's Wharf.

During the evening of March 10, 1985, appellees served substantial quantities of alcoholic beverages to Steven Chase, who, at the time, was already very, very drunk. Immediately prior to being served by appellees, Chase had been refused service at two other bars and ejected from a third.

Appellees knew that Chase was obviously intoxicated because, among other things, Kinney saw Chase fall off his barstool. Appellees continued serving Chase. Each appellee knew that

Chase was so drunk that he was not in responsible command of his own conduct. Appellees also knew that Chase would leave by motor vehicle. Despite such knowledge, appellees continued to serve cocktails to Chase in order to get money from Chase.

Soon after leaving Woody's Wharf, the pick-up truck driven by Chase collided with and killed Joey, who was riding his bicycle home from work. At the time Chase killed Joey, Chase's blood alcohol level was in excess of .30%.[1] Chase was so drunk that he did

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[1] A blood alcohol level of .30% is three times the legal limit. The California Supreme Court has noted that at blood levels in excess of .20% a casual observer will be able to detect signs that the person is drunk, and if a person's blood alcohol level is between .30% and .40%, the person will begin to become comatose. [See Ewing v. Cloverleaf Bowl, 20 Cal.3d 389, 398, 143 Cal.Rptr. 13 (1978).]

not realize at the time of impact that he had hit a person even though his windshield was smashed.

Chase left the scene and was arrested three hours later and has pleaded guilty to felony charges arising out of the accident. At the time appellants' filed their first amended complaint, appellee Kinney was being criminally prosecuted for violating California Business & Professions Code §25602(a) which prohibits service of alcohol to an obviously intoxicated person.

Appellees continued to serve Chase for their own pecuniary gain in conscious disregard of the risk to Joey and other people on the highways. Joey was killed as a direct and

proximate result of appellees' criminal misconduct.

THE QUESTION IS SUBSTANTIAL

In 1978, the California legislature amended California Business & Professions Code §25602 and Civil Code §1714(b) to immunize people who serve alcohol to others who are "obviously intoxicated." The legislature also created a statutory exception in Business & Professions Code §25602.1, allowing claims against a licensed alcohol provider who serves an obviously intoxicated minor ("the 1978 Amendments").[2] Ironically, if Joey had been as intoxicated as Chase, had consumed so much alcohol at Woody's

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[2] Under California law, a minor for purposes of alcoholic beverage control is anyone under 21 years of age. [California Constitution, Article XX, Section 22(d).]

Wharf that he was almost comatose, had left appellees' bar on his bicycle, and had swerved onto the highway into the path of an innocent driver, then Joey could have successfully sued appellees under the 1978 Amendments. [See Chalup v. Aspen Mine Co., 175 Cal.App.3d 973 (1985).]

Because Chase was over twenty-one, however, appellees have no civil liability under the 1978 Amendments for their criminal acts which led to Joey's death. As we will show below, the 1978 Amendments deny equal protection to appellants and others similarly situated because the legislation discriminates against innocent minors and against victims of crime.

The 1978 Amendments also presume conclusively that the consumption of

alcohol, rather than the service of alcohol, is the proximate cause of any subsequent injury. This irrebuttable presumption denies to appellants their due process rights to an individualized determination on the issue of causation.

Drunk driving is a menace in this country, a sizeable and deadly menace. Imposing economic liability upon the server of alcohol is an effective means of preventing drunk-driving and its resulting carnage. A majority of states have laws regulating server liability. The issues raised in this appeal are not "academic or episodic" and have implications well beyond the effect on the immediate parties. Appellants request that this Court note probable jurisdiction and set the case

for plenary consideration or, alternatively, reverse the opinion below.

THE 1978 AMENDMENTS DISCRIMINATE AGAINST INNOCENT MINORS

The Fourteenth Amendment mandates that no state may "deny to any person within its jurisdiction the equal protection of the laws" and requires that "all persons similarly circumstanced shall be treated alike." [Reed v. Reed, 404 U.S. 71, 75-76, 30 L.Ed. 225, 229, 92 S.Ct. 251 (1971).]

Tests to determine the sufficiency of state statutes under the equal protection clause have been variously expressed. At a minimum, a statutory classification must bear some rational relationship to a legitimate state purpose. [Weber v. Aetna Casualty and

Surety Company, 406 U.S. 164, 172, 31 L.Ed.2d 768, 92 S.Ct. 1400 (1972).] A statute is unconstitutional where it creates different classes of citizens without any rational basis for the classifications. [Reed v. Reed, supra, 404 U.S. at 76.][3] The 1978 Amendments classify minors arbitrarily to promote the ends of a powerful special interest lobby, the liquor supply industry.

The Court of Appeal acknowledges that the 1978 Amendments creates two classes of minors and that ". . .minors injured through their own intoxication

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[3] Appellants contend that because the 1978 Amendments affect a fundamental personal right, the right to life, the highest level of scrutiny is required. [See Weber v. Aetna Casualty and Surety Co., supra, 406 U.S. at 172, 173 (1972).] For purposes of this jurisdictional statement, however, appellants will demonstrate that the 1978 Amendments cannot pass even a minimum level of examination.

may bring civil suit . . . but young people harmed through no fault of their own may not." [Appendix A at p. A-24.] The Court of Appeal in conclusory fashion approves the constitutionality of this distinction on the basis of Cory v. Shierloh, 29 Cal.3d 430, 174 Cal.Rptr. 500 (1981). Cory however, is distinguishable.

Cory addressed the question of whether minors are entitled to greater protection than adults. The answer, according to Cory, was yes. [Cory v. Shierloh, supra, 29 Cal.3d at 440.] The issue here, however, is whether a minor that has violated liquor laws is entitled to greater protection than an innocent minor. Cory did not decide this issue.

Innocent minors deserve equal or greater protection than criminal minors. The Court of Appeal decision, however, has the opposite effect. A comparison of this case to Chalup v. Aspen Mine Co., supra, shows how the 1978 Amendments protect under-age drinkers while leaving innocent children without a remedy.

The plaintiff in Chalup, an 18-year old, went to a bar and drank between five and seven vodka gimlets. Upon leaving, she ran across the street against the traffic signal and into the path of a car, sustaining injuries. The California Court of Appeal narrowly construed Business & Professions Code §25602.1 and concluded that the plaintiff could state a cause of

action against the bar for serving an obviously intoxicated minor.

The following hypothetical situation illustrates the absurdity of the distinctions created by the 1978 Amendments. A person, on the day before his twenty-first birthday, enters a bar and illegally drinks past the point where he is "obviously intoxicated." If the person then leaves the bar, stumbles off the curb, and injures himself, that person may sue the bar. The next day, the same person could enter the same bar and drink the same quantity of alcohol. If the person left the bar, started driving and struck a three year old child playing in her front yard, the child would not have a cause of action against the bar even if, as a result of

the accident, she were rendered a quadriplegic with brain damage.

One wonders what public interests are served by this classification scheme. In evaluating or defining the "rational basis" for a statute, the court should look at the actual legislative purposes of an act and not strain to invent an unrealistic or tenuous state purpose.

The distinctions between innocent and criminal minors become even more nonsensical upon examination of the theoretical reasons for the 1978 Amendments. The purported bases for not protecting all minors equally and for discriminating against innocent minors are not rational by any standards.

The real reason for the 1978 Amendments is to grant economic preference to a powerful special interest group, the liquor lobby.

One governmental interest purportedly promoted under Business & Professions Code §25602.1, according to the Chalup and Cory courts, is the protection of people under twenty-one. [Chalup v. Aspen Mine Co., supra, 175 Cal.App.3d at 978; Cory v. Shierloh, supra.] As a minor, Joey Howe was in the class of people to be protected by Business & Professions Code §25602.1. Yet Joey's fundamental right to life does not receive the same protection afforded to a drunken 18-year old.

Another alleged basis for the immunity involves "fairness" to the server of alcohol and his insurer.

[Cory v. Shierloh, supra, 29 Cal.3d at 439, 440.] The fallacy underlying the "fairness" rationale is that where a bar serves a drunk who has lost his judgment, the server's criminal misconduct is a wrongful act, independent of the drunk's misconduct. An analogous situation occurs where a person entrusts an automobile to an obviously intoxicated person. The drunk driver's subsequent misconduct does not relieve the entrustor of liability for creating the hazard when he gave the car keys to the drunk. [Blake v. Moore, 162 Cal.App.3d 700, 702, 208 Cal.Rptr. 703 (1984).] If a party can be held liable for giving car keys to a drunk, a bar can be held liable, with equal fairness, for

serving liquor to a drunk with car keys.

The "unfair" burden to the bars' insurers involves the payment of claims to injured third parties. Claims payments should not be an economic burden, though, because the carriers have supposedly collected premiums to pay these claims. Moreover, criminal acts are not insurable under California law [see California Insurance Code Section 533]. The true effect of the 1978 Amendments is to grant a windfall to carriers that have collected premiums but no longer have any exposure to the victims of their insureds' crimes.

Even if civil liability were "unfair", protection of insurance companies through the elimination of a

class of actions is not a legitimate state purpose. The California Supreme Court in Brown v. Merlo noted that "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of the designated class may file fraudulent lawsuits." [Brown v. Merlo, 8 Cal.3d 855, 875, 106 Cal.Rptr 388 (1973).] The evil of this kind of legislation is that it is over inclusive and imposes a truly unfair burden on innocent individuals. A third theoretical basis for the 1978 Amendments is to reduce "the frequency of alcohol-caused injuries." [Cory v. Shierloh, supra, 29 Cal.3d at 440.] The theory, according to Cory, is that a drunk with exclusive liability will experience "some heightened sense of

responsibility" and drive more carefully. [Id.] This analysis is flawed. No driver, sober or obviously intoxicated, intends to have an accident and therefore goes through the kind of sophisticated mental analysis postulated by the Supreme Court in Cory.

The folly of this "safety basis" is highlighted by reference to Business & Professions Code §25602(a). The state prohibits service of liquor to an obviously intoxicated person in order to limit the amount of alcohol served and to reduce the number of alcohol-related injuries. The lucid bartender, not the sloppy drunk, has the statutory duty to say "when."

Where a civil immunity is granted to the commercial provider of alcohol,

there is little economic incentive to stop serving liquor and, if insurance rates are lowered, the cost of serving liquor is reduced. Thus, the effect of the immunity provided by Business & Professions Code §25602(b) is to increase the amount of alcohol served and therefore increase, rather than decrease, the number of alcohol-related injuries.

The real reason for the 1978 Amendments is reflected in the identity of the author of their legislative history, namely the United Spirits Association. When this legislation was passed, the victims of discrimination, those unknown and voiceless future victims, were in no position to oppose the powerful special interest group that pushed through this ridiculous

piece of legislation. This basis for the legislation, while real, is in no way rational. Appellants' only hope for justice lies with this court. The Court of Appeal decision should be reversed or this case set for plenary hearing.

BUSINESS & PROFESSIONS CODE §25602(b) DISCRIMINATES AGAINST VICTIMS OF CRIME

It is a crime to serve alcohol to an obviously intoxicated person. [Business & Professions Code §25602(a).] Business & Professions Code §25602(b), which grants an immunity to people who violate §25602(a), represents an institutionalized preference for the rights of criminals over the rights of the victim.

One of the remedies available to the victim of a crime is the right to file a civil suit for damages against the criminal. Where the crime involves a bartender or bar serving an obviously intoxicated patron, however, Business & Professions Code §25602(b) takes away the victim's right to sue. The criminal, not the victim, is protected by the state.

The law has long recognized that "no one should suffer by the act of another" [California Civil Code §3520] and that "for every wrong there is a remedy." [California Civil Code §3523.]

That the rights of innocent victims deserve greater protection than the rights of those who inflict the injury is an undisputed ethic in this country.

Every victim should have the right to sue the criminal that caused his injury. The 1978 Amendments grant an economic preference -- immunity -- to one group of citizens at the expense of another. This is constitutionally prohibited.

When the wrongful act is also a crime, the existence of a civil remedy is especially important since it can act as an additional means of law enforcement. As the dissent noted in Kindt v. Kauffman, 57 Cal.App.3d 845, 873 (1976):

> "Available law enforcement and Alcoholic Beverage Control personnel can supply only sporadic policing at best. Sustained, effective control of these myriad establishments

through criminal and licensing sanctions is virtually impossible. An absentee tavern keeper may reap profit from his bartender's chronic disregard of the statute, [Section 25602], shielding himself from criminal liability by claims of ignorance and non-participation. As a criminal and licensing sanction, Section 25602 is ineffectual to stem the tide of drink-caused traffic carnage. In a civil damage action, the tavern operator's responsibility for the bartender's breach would stimulate the operator to energetic policing of his own establishment. Damage eligibility, extended to all

within the protective scope of Section 25602, would supply a silent, steadfast deterrent to the statute's violation."

The legislature has recognized that the bar and bartender who serve an "obviously intoxicated person" create risks of injury to the general public. Thus, the law proscribes this conduct. Any criminal sanction, however, is only as good as its enforcement. The 1978 Amendments are unreasonable because they discourage rather than promote compliance with criminal statutes.

The purported bases for the 1978 Amendments, discussed above, are even more irrational in the context of victim's rights. As claimed in Cory, the 1978 Amendments supposedly promote highway safety and fairness to the

bartender and its insurance carrier. No one truly believes that the law should be more fair to the criminal than it is to the criminal's victim.

The broad immunity of the 1978 Amendments unfairly shifts the economic burden of the uninsured drunk driver to the innocent victim rather than place it on the tortfeasor-bartender (or bar). Where two criminals act independently or concurrently, ". . . the innocent wronged party should not be deprived of his right to redress" even though apportionment of the injury may be difficult or incapable of proof. [See Summers v. Tice, 33 Cal.2d 80, 88 (1948).] "The wrongdoers should be left to work out between themselves any apportionment." [Ibid.] Indeed the rule of joint and

several liability exists so that an injured party may "obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability." [American Motorcycle Association v. Superior Court, 20 Cal.3d 578, 590 (1978).]

There is a strong public policy interest to "assure 'monetary protection to that ever-changing and tragically large group of persons who . . . suffer grave injury through the negligent use of the highways by others.'" [Jess v. Herrmann, 26 Cal.3d 131, 138-39 (1979).] California and many other states have financial responsibility laws requiring drivers to have insurance. Despite these efforts, those who drink and drive,

especially those who are repeat offenders, are not likely to have insurance and are not likely to be financially responsible for the consequences of their destruction.

Business & Professions Code §25602(b) confers a benefit on bar owners and bartenders which is not granted on the same terms to all citizens -- the ability to avoid the civil consequences of one's criminal misconduct. The cost of this benefit is borne by innocent victims like appellants and Joey.

THE COURT OF APPEAL DECISION DENIES TO PETITIONERS THEIR DUE PROCESS RIGHT TO AN INDIVIDUALIZED DETERMINATION ON THE ISSUE OF CAUSATION

Business & Professions Code Section 25602(c) and Civil Code Section

1714(b)[4], which are part of the 1978 Amendments, conclusively presume that service of alcohol cannot cause subsequent injuries to third parties. A conclusive presumption violates due process guarantees "when that presumption is not reasonably or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." [Vlandis v. Kline, 412 U.S. 441, 452, 37 L.Ed.2d 71, 93 S.Ct. 2230 (1973); see also, In Re Lisa R., 13 Cal.3d 636, 651 (1975); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 86 L.Ed.2d 487,

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[4] These statutes reflect a legislative declaration that "the holdings in such cases as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144)" are abrogated. These statutes are referred to hereinafter as the "anti-Vesely statutes".

105 S.Ct. 2862 (1985).] The rule against irrebuttable presumptions is based on a constitutional belief that a party's fundamental right to be heard outweighs the state's interest in administrative ease and convenience. [Vlandis v. Kline, supra, 412 U.S. at 451-452.]

The presumed fact in the 1978 Amendments, that service of alcohol cannot cause injuries, is not universally true. The legislature recognizes in Business & Professions Code §25602.1 that service of liquor to an obviously intoxicated minor can cause injuries. In Cantor v. Anderson, 126 Cal.App.3d 124 (1981), at least one California court has recognized that service of liquor to someone with an

exceptional physical or mental condition can cause injuries.[5]

The causal connection between service of alcohol and subsequent injury has been recognized in California by both the legislature and the judiciary. The anti-Vesely statutes fail the first prong of the Vlandis test.

The anti-Vesely statutes fail the second prong, as well, because the state has a reasonable alternative means of determining causation -- civil litigation. Civil litigation is used to determine causation under Business & Professions Code §25602.1 and in Cantor actions. Civil litigation is used to determine

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[5] The Cantor exception was cited with approval by the California Supreme Court in Strang v. Cabrol, 37 Cal.3d 720, 726, 209 Cal.Rptr. 347 (1984).

causation in many situations where there is more than one concurrent cause. For example, a landowner may be held liable for the criminal acts of third parties where the criminal acts are reasonably foreseeable. [Issacs v. Huntington Memorial Hospital, 38 Cal.3d 112, 211 Cal.Rptr. 356 (1985).] More significantly, a party may be held liable to third parties for negligent entrusting an automobile to an obviously intoxicated person. [Blake v. Moore, supra.]

The legislative fiat of "no causation" is an improper encroachment on the fact finding role of the jury. Civil litigation is a reasonable alternative to an unfair and unconstitutional irrebuttable presumption. Petitioners are entitled

to have a jury decide whether Joey's death was caused by service of alcohol to an adult who was so drunk that he could not hold himself on a barstool and could not voluntarily stop drinking.

The Court of Appeal cites dictum from Valdez v. J.D. Diffenbaugh Company, 51 Cal.App.3d 494, 509 (1975) for the proposition that proximate causation is a policy decision, not a factual issue. In the paragraph of the Valdez decision referred to by the Court of Appeal, the Valdez court concluded that proximate causation was present on the basis of an earlier determination that the defendant owed a duty of care and that the injury and manner of occurrence were foreseeable. [Ibid.] Valdez appears to confuse the

concepts of proximate causation and duty.

While the notions of duty and proximate causation are often blurred, the more reasoned approach treats duty as a policy decision appropriate for determination by the court and the issue of proximate cause as a question of fact for the jury. [6 Witkin, Summary of California Law (9th Ed. 1988) Torts, Section 748, 749, pp. 83-86.] Proximate causation is not a policy decision; it is a question of fact. [See Bigbee v. Pacific Telephone and Telegraph, 34 Cal.3d 49, 56 (1983).]

Even if proximate cause can, in some circumstances, be considered a policy decision, those circumstances do not apply to the anti-Vesely statutes.

Whether one calls it a duty or not, the legislature has made a policy decision in Business & Professions Code §25602(a) that alcohol should not be served to an obviously intoxicated person. The Court of Appeal's interpretation of the anti-Vesely statute as a contrary policy decision leads to inconsistencies within the statute. Such an interpretation is disfavored under usual rules of construction. To harmonize the statutes, the anti-Vesely statutes must be considered as factual, not policy, determinations which violate constitutional due process guarantees.

THIS APPEAL RAISES ISSUES OF GREAT PUBLIC CONCERN

This Court has historically noted probable jurisdiction in cases raising

issues of "growing nationwide importance . . ." [Camara v. Municipal Court, 387 U.S. 523, 525, 87 S.Ct. 1727 (1967).] Drunk drivers, victim's rights and the protection of minors are all significant social issues. The case should be set for plenary consideration.

More than 40,000 people die each year due to car accidents and another 1.3 million are disabled. [National Center for Statistics & Analysis, National Highway Traffic Safety Administration, Tracking the Alcohol Involvement Problem in U.S. Highway Crashes (1983).] Alcohol is implicated in more than half of these deaths: 58 percent of all fatalities involve individuals with some contact with alcohol, and 49 percent of the drivers

had blood alcohol levels of .10 percent or above. [Id.][6]

Alcohol is less likely to be involved in non-fatal car accident injuries -- only 17 percent -- but the more serious the injury, the more likely it is that alcohol is involved. [National Safety Council, Drunk Driving Facts (1982).] Nonetheless, approximately 200,000 non-fatal, serious injuries are attributable to drunk driving each year. [Id.]

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[6] A blood alcohol level of .10% is the most common legal standard for legal intoxication, R. Erwin, Defense of Drunk Driving Cases, Chapter 1, "Elements of the Offense - The Statutes and Judicial Interpretations" (Matthew Bender 1983), even though epidemiological research suggests that impairment for most people will begin at a blood alcohol level of .05% or lower, Baker, O'Neill & Karpf, the Injury Fact Book (1984).

Car accidents are the number one cause of death and serious injury for those under 25; young people constitute approximately 45 percent of the total of 24,000 annual drunk driving deaths. [National Center for Statistics & Analysis, National Highway Traffic Safety Administration, Tracking the Alcohol Involvement Problem in U.S. Highway Crashes (1983).] Such a statistic takes on an all-too-grim reality if one realizes that 14 teenagers are killed, and another 360 are injured, every day due to drunk driving.

Such havoc has not escaped judicial notice:

> "The drunk driver cuts a wide swath of death, pain, grief and untold physical and emotional

injury across the roads of California and the nation. The monstrous proportions of the problem have often been lamented in graphic terms by this court and the United States Supreme Court. (Citations omitted.) . . . [I]n the years 1976 to 1980 there were many more injuries to California residents in alcohol-related traffic accidents than were suffered by the entire Union Army during the Civil War, and more were killed than in the bloodiest year of the Vietnam War. (Citations omitted.) Given this setting, our observation that '(d)runken drivers are extremely dangerous people' (citation omitted) seems almost

> to understate the horrific risk posed by those who drink and drive.' Stopping the carnage wrought on California highways by drunk drivers is a concern the importance of which is difficult to overestimate." [Ingersoll v. Palmer, 43 Cal.3d 1321, 138-139 (1988) (quoting in part Burg v. Municipal Court, 35 Cal.3d 257, 262 (1983).]

Those who drink and drive often drink substantially to excess -- the mean blood alcohol level for drivers who had at least some level of alcohol in their blood is .16 percent. [National Center for Statistics and Analysis, National Highway Traffic Safety Administration, Tracking the

Alcohol Involvement Problem in U.S. Highway Crashes (1983).]

A recent Bureau of Justice Statistics survey of drinking drivers in 407 local jails in 1983 showed that nearly half had been sentenced for previous DWI convictions. Moreover, three-quarters of those repeaters had been in treatment. "The survey also showed a frightening level of drinking. The average drunken driver had drunk six ounces of alcohol, the equivalent of twelve beers or eight mixed drinks. More than a quarter of the drunken drivers had consumed at least ten ounces of alcohol, the equivalent of twenty beers or thirteen mixed drinks." [ABA Journal 56, September 1988.]

One way to "stop[] the carnage" is to stop the flow of alcohol. Stopping

the flow is possible because the flow is often in the hands of third parties. Studies indicate that most drunk drivers become intoxicated in places other than in their own homes. For example, two roadside breath-test surveys report that approximately 40 percent of those stopped who had blood alcohol levels of .10 percent or above were driving from bars or taverns. [Damkot, Alcohol Incidence in Rural Drivers: Characteristics of a Population and Clues for Counter Measures, 9 Drug & Alcohol Dependence 305, 322 (1982); Wolfe, 1973 U.S. National Roadside Breathtaking Survey, 4 Hit Lab Reports 73 (Highway Safety Research Institute, Univ. of Mich. 1974).] A somewhat higher number is reported for those arrested or

convicted of driving under the influence. [J. Mosher & Wallack, The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems, 47 (1979); Ryan & Segars, San Diego County First Conviction Program Population Description 13 (1983); R. Yoder, Pre-arrest Behavior of Persons Convicted While Intoxicated, 36 J. Studies on Alcohol 1573, 1576 (1975).] Two studies have cited sports events as places often frequented by people who drink before driving, and airports and large discotheques have also been cited. [Mosher & Wallack, supra; Ryan & Segars, supra.]

As in this case, commercial sellers of alcohol are often the people who are pouring the alcohol for those who drink

and drive. Sellers of alcohol are often in the best position to prevent intoxicated persons from causing harm to innocent third parties. The seller observes the person in an intoxicated state and is the last person able to take measures to insure that the intoxicated person will not cause further harm to anyone but himself. Making commercial sellers civilly liable for the foreseeable injuries that result from their illegal sales of liquor to intoxicated persons[7] may well stop the flow of alcohol.

Potential civil liability can have a sobering effect on bars and bartenders. Taverns operators will train their employees with respect to

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[7] Every state prohibits sale of alcohol to obviously intoxicated persons. Mosher, §1.04[2][[b] at 1-18.

responsible serving practices. Bartenders will police the sobriety of the patrons more carefully. Tort suits also assist the state in forcing alcoholic beverage regulation.

During 1974 and 1975 there was a total of 48,000 alcoholic beverage licenses issued yet the California Department of Alcoholic Beverage Control filed only 582 accusations for violations of §25602. [Kindt v. Kauffman, supra, 57 Cal.App.3d at 873, n. 10.] The probable rate of violation is much greater than that handled by administrative agencies. Placing the burden of enforcement on the police and other law enforcement agencies is likewise a drain on taxpayer resources. Civil liability encourages saloonkeeper responsibility without requiring any

additional bureaucratic mechanism or burden to the taxpayer.

The effectiveness of imposing such liability is implicit in this case. Before appellees served Chase, three bars had refused him service. Chase was so drunk at the time he consumed his drink in defendant's bar -- he was falling off the stool -- that appellees would have been the only people who were in a condition to decide whether the driver was fit to consume any more liquor. If appellees had been deterred from making any sales by the prospect of liability for any injuries the drunken driver might have caused, appellants' son might be alive today.

CONCLUSION

For all of the foregoing reasons, this Court should note probable

jurisdiction of this appeal or, in the alternative, reverse the decision of the California Court of Appeal.

Respectfully submitted,

William T. Rintala
Robert A. Rees
RINTALA, SMOOT, JAENICKE & BRUNSWICK
10351 Santa Monica Boulevard, Suite 400
Los Angeles, California 90025
(213) 203-0935

PAUL G. REES, JR., ESQ.
510 East Limberlost
Tucson, Arizona 85705
(602) 293-9066

Counsel for Appellants

APPENDIX A

APPENDIX A

OPINION BELOW

APPEAL from a judgment of the Superior Court of Orange County, Ronald M. Bauer, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.

Paul G. Rees, Jr., Rintala, Smoot, Jaenicke & Brunswick and Robert A. Rees for Plaintiffs and Appellants.

Wankovsky & Rosenberg and Edward J. Wankovsky as Amicus Curiae on behalf of Plaintiffs and Appellants.

Wood, Ward & Garnet, and Gayle R. Posner for Defendants and Respondents.

Joseph and Doris Howe appeal from an order of dismissal after a demurrer to two counts of their complaint was sustained without leave to amend. Their causes of action against a bar

and a bartender for the wrongful death of their son, who was struck and killed by an intoxicated driver, were dismissed pursuant to statutes limiting an alcohol vendor's civil liability. (Business & Professions Code, §25602; Civ. Code, §1714.) The Howes assert (1) their claim falls outside the scope of these statutes, and (2) the legislation is unconstitutional.

FACTS

The Howes' first amended complaint was brought against Norchek of Newport, Inc. (doing business as Woody's Wharf), Robert Kinney and other defendants. They alleged their 20-year-old son, Joey, was killed when his bicycle was struck by a truck driven by Steven Chase who was intoxicated at the time.

The complaint contained two causes of action against Norchek and Kinney for claimed negligence and willful misconduct in serving alcohol to Chase. The following facts were alleged. Chase was extremely intoxicated when he arrived at Woody's Wharf, after having been refused service or ejected from at least three other establishments. Kinney, the bartender at Woody's, was aware of Chase's extreme intoxication; he observed the man fall off a barstool. In spite of this, Kinney continued to serve alcohol to Chase, with knowledge that Chase had lost control of himself and was unable to voluntarily stop drinking. Kinney knew Chase would be driving when he left. Kinney and Norchek intentionally sold Chase alcohol, with conscious disregard

for the consequences, for their own pecuniary gain. At the time of the accident, Chase had a blood alcohol level above .30% and did not even realize he had hit the boy. When the complaint was signed, Chase was in state prison, having pleaded guilty to felony charges.

The Howes' complaint requested general and punitive damages for emotional distress and loss of their son's care, companionship and monetary assistance. Norchek and Kinney demurred claiming they were immunized from civil liability under Business & Professions Code section 25602 and Civil Code section 1714.[1] Subdivisions

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[1] Business and Professions Code Section 25602 states: "(a) Every person who sells . . . any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is

guilty of a misdemeanor. [¶] (b) No person who sells . . . any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage. [¶] (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

Civil Code Section 1714 reads in pertinent part: "(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care . . . . [¶] (b) It is the intent of the Legislature to abrogate the holding in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court [(1978)] ([21] Cal.3d [144] and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing

(b) and (c) of each of those sections were added in 1978 to abrogate judicially-created liability for injuries resulting from the furnishing of alcohol to intoxicated persons. (Those subdivisions are referred to herein as the "1978 amendments".) The trial court sustained Norchek and Kinney's demurrer without leave to amend and dismissed the action as to these defendants only.

DISCUSSION

On appeal from a demurrer, an appellate court must determine whether the complaint states sufficient facts to show plaintiff "'"'may be entitled

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alcoholic beverages to an intoxicated person . . . [¶] (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages . . . resulting from the consumption of such beverages."

to some relief.'"'" (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572.)

The Howes contend they are entitled to relief because the 1978 amendments are inapplicable to their action. They also challenge the constitutionality of the 1978 amendments on equal protection and due process grounds.

I

We first address the Howes' arguments the 1978 amendments are inapplicable to this case. In doing so, we are guided by our Supreme Court's recognition of the broad coverage of the amendments: "The 'single exception' to the 'sweeping immunity' afforded by the 1978 amendments [citation] is in cases of sale by a licensee to an obviously

intoxicated minor ([Business & Professions Code section] 25602.1)." (Strang v. Cabrol, (1984) 37 Cal.3d 720, 725.) "No other exceptions to this immunity exist." (Id., at p. 728.) At least three Courts of Appeal, however, have recognized other implied exceptions to the 1978 amendments. (Cantor v. Anderson (1981) 126 Cal.App.3d 124 [furnishing alcohol to person with an exceptional mental or physical condition]; Blake v. Moore (1984) 162 Cal.App.3d 700 [negligent entrustment of car to intoxicated driver]; O'Toole v. Carlsbad Shell Service Station (June 6, 1988, D005891) ___ Cal.App.3d ___ [negligent sale of gasoline to intoxicated driver].) And, in spite of its reference to a single exemption, the Strang court cited the

Cantor implied exception with approval. (Strang v. Cabrol, supra, 37 Cal.3d at p. 726.)

The Howes ask this court to recognize another implied exception to the amendments, which would significantly diminish an alcohol provider's immunity. They seek imposition of civil liability for furnishing liquor to an extremely intoxicated person who is unable to refuse another drink. The Howes contend, under those circumstances, the alcohol purveyor has sole control over the drinker's consumption, and the continued service of alcohol amounts to willful misconduct. They argue the 1978 amendments were not intended to abrogate liability for willful misconduct, but only for negligence.

In Cory v. Shierloh (1981) 29 Cal.3d 430, our Supreme Court recognized the 1978 amendments may apply to non-negligence theories of recovery, if the "essence of the charging allegations" falls within the statutory prohibition. (Id., at p. 436.) Here, the substance of the complaint is that defendants sold alcohol to an obviously intoxicated patron and the Howes were injured as a result. These allegations fall squarely within Business & Professions Code section 25602's bar to recovery. The Howes' only additional allegations involve the degree of the patron's intoxication, i.e., that he was "falling off the stool" drunk and had obviously lost all volition as to his drinking. The Howes assert these additional allegations bring them

outside of the statutory bar, relying primarily on Ewing v. Cloverleaf Bowl, (1978) 20 Cal.3d 389.

In Ewing, a bartender served a patron 10 shot glasses of 151 proof rum within a short period of time. He did so with knowledge of the drink's acute potency, of the patron's youth and inexperience, and of the immediate health risk created by an excessive consumption of alcohol. (Id., at pp. 397, 402-403.) The patron died of alcohol poisoning and his wife and children brought an action against the bartender. The trial court granted the bartender's motion for nonsuit after finding the patron had been contributorily negligent. (Id., at p. 394.) Our Supreme Court reversed, holding the jury could reasonably have

concluded the bartender engaged in willful misconduct, in which case the patron's contributory negligence would not bar plaintiffs' recovery. (Id., at pp. 401, 402.)

Ewing preceded the 1978 amendments and its continued viability is unclear. The Howes note Ewing was not expressly abrogated by the 1978 amendments, which specifically overturned "cases such as" Vesely v. Sager (1971) 5 Cal.3d 153, Bernhard v. Harrah's Club (1976) 16 Cal.3d 313, and Coulter v. Superior Court (1978) 21 Cal.3d 144, each of which involved negligence claims. The Legislature's reference to those three cases, however, was not intended to be a limiting one. (Strang v. Cabrol, supra, 37 Cal.3d at p. 725.) We think it unlikely that the willful

misconduct cause of action recognized in Ewing survives the 1978 amendments.[2] Those amendments reinstated the common law rule that the consumption of alcohol is the proximate cause of injury. A willful misconduct cause of action is grounded on the theory defendants' service of alcohol proximately caused injury. (See discussion of non-negligence claims in Hepe v. Paknad (1988) 199 Cal.App.3d

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[2] The legislative history of the 1978 amendments makes no reference to Ewing, but does suggest the legislation was intended to leave intact "existing case law which has generally denied the intoxicated person and/or his heirs any recovery against a person in violation of section 25602." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1645 (1977-1978 Reg. Ses.).) Furthermore, the legislative history evinces a clear intent to immunize alcohol providers from all civil liability for injuries caused by intoxicated persons, and not simply from negligence liability.

412, 415, 421; Cory v. Shierloh, supra, 29 Cal.3d at pp. 436-437.) Moreover, the 1978 amendments created an exception to the general principle that everyone is responsible for the results of his or her negligent or willful acts. (Civ. Code §1714, subds. (b) & (c); see Cory v. Shierloh, supra, 29 Cal.3d at p. 435.) We note the facts in this case are no more egregious than those in Vesely and Coulter, where plaintiffs alleged defendants served alcohol to "excessively intoxicated" persons who had lost volitional control over their drinking behavior. (Vesely v. Sager, supra, 5 Cal.3d at pp. 157-158; Coulter

v. Superior Court, supra, 21 Cal.3d at p. 148.[3]

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[3] The Howes cite a 1979 law review article which concludes Ewing is still viable, but also states that willful misconduct claims must be limited to suits by a patron involving "extremely culpable conduct by a bartender." (Duff, Legislation and the Ewing Case: The Status of the Patron Plaintiff (1979) 11 Sw.U.L.Rev. 1451, 1465, emphasis added.) The allegations of bartender misconduct here do not approach the level of culpability present in Ewing nor is the patron here the complaining party.

The Howes assert Business and Professions Code section 25602 is ambiguous, pointing to the reference in subdivision (b) to the sale or furnishing of alcohol "pursuant to subdivision (a)." They also cite the general principle that courts must narrowly construe statutes limiting recovery for tortious wrongs. (O'Toole v. Carlsbad Shell Service Station, supra, ___ Cal.App.3d at p. ___.) We find no ambiguity in the statute, however, and hence no need to narrowly construe it.

The Howes argue subdivision (b) must be strictly limited to negligence actions or "absurd results" will follow. To illustrate, they pose a hypothetical in which a bartender intends to murder a patron through alcohol poisoning. Civil liability for

We conclude the Howes' willful misconduct cause of action is barred by the 1978 amendments.

II

The Howes next contend their negligence and willful misconduct causes of action are cognizable under Cantor v. Anderson, supra, 126 Cal.App.3d 124, which recognized an alcohol provider's liability for furnishing liquor to a person with "an exceptional mental or physical condition." (Id., at p. 125.) There, a developmentally disabled man was supplied alcohol by defendants and, in a strong reaction to the intoxicant, suffered seizures and unconsciousness,

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murder, however, has independent statutory support. (Civ. Code §3294, subd. (d) [authorizing punitive damages for a wrongful death by felony homicide].)

and involuntarily attacked the plaintiff. (Id., at p. 126.) The court held the 1978 amendments do not extend immunity to a social host who serves a guest alcohol with knowledge of his or her exceptional mental or physical condition. (Id., at pp. 130-131.)

The Cantor court explained that the 1978 amendments reinstated both the common law rule of immunity and its common law exceptions. (Id., at p. 130.) The holding was based on an exception which the court believed was implicitly recognized in Cole v. Rush (1955) 45 Cal.2d 345, a case which applied the common law rule. In Cole, our Supreme Court stated "that as to a competent person it is the voluntary consumption, not the sale or gift, of

intoxicating liquor which is the proximate cause of injury from its use." (Id., at p. 356; emphasis added.)

The Cantor court cited Cole's reference to the applicability of the common law rule to the "ordinary," "competent" person. (Cantor v. Anderson, supra, 126 Cal.App.3d at p. 130.) In dicta the Cantor court stated: "Thus, the common law rule did not affect liability for the furnishing of alcoholic beverages to a person unable to voluntarily resist its consumption; e.g., one 'who was in such a condition as to be deprived of his will power or responsibility for his behavior . . .' [Citation.]" (Ibid.)

The Howes assert Chase too was drinking involuntarily; therefore,

their claim falls within the Cantor exception. We disagree. Although dicta in Cantor might support this conclusion, the court emphasized its holding was "a narrow one." (Id., at p. 132.) The court cautioned that retarded or developmentally disabled persons as a class should not be deemed incompetent. (Ibid.) It thus suggested that the determination of competency must be made on a case by case basis. It did not, however, provide any guidance as to the criteria for determining competency.

Nor did Cole define the terms "competent person" or "ordinary man."[4]

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[4] Cole did discuss competency in terms of volition (Id. at p. 354), but this discourse was qualified by its preliminary observation such analysis might be irrelevant under California law: "Other cases, from other jurisdictions, relied upon by

However, the drinker in that case was deemed competent because he was an "'able-bodied man'" who was sober when he arrived at the bar. (Cole v. Rush, supra, 45 Cal.2d at p. 354.) He did not lose his status as a competent person just because he was served alcohol to the point of becoming

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plaintiffs are clearly distinguishable on their facts, even if it be assumed that upon similar facts action would lie in California." (Id., at p. 352, emphasis added.) Thus, although the court factually distinguished Pratt v. Daly (1940) 55 Ariz. 535 [habitual drunkard was "incapable of voluntary action"] and other out-of-state decisions, it did so upon the reservation such cases might have no support under California law. Significantly for the instant case, the Cole holding was expressly based on three California cases, one of which affirmed the immunity of a defendant tavern keeper who sold alcohol to a minor "while he was already under the 'severe influence of intoxicating liquors.'" (Id., at p. 350, emphasis omitted, citing from Fleckner v. Dionne (1949) 94 Cal.App.2d 246, 247.)

intoxicated and belligerent. (Id., at p. 347.) Cole and Cantor indicate incompetency relates to exceptional mental or physical conditions, existing independently of alcohol consumption, which interact with such consumption to cause injury.

Recently, the Sixth District in Hepe v. Paknad, supra, 199 Cal.App.3d 412 declined to expand the Cantor exception, finding it did "not have a sound statutory basis." (Id., at p. 418.)

There is no California precedent for recognition of an exception based on the incompetency of the drinker due to extreme intoxication. To recognize one here would undermine the legislative mandate, as severe intoxication would be alleged in a case where injury

results. The statute is clear; it creates immunity for the provision of alcohol to "any habitual or common drunkard" or "obviously intoxicated person." (bus. & Prof. Code, § 25602, subd. (a).) There is no authority for the exception the Howes propose.

III

The Howes contend Business & Professions Code section 25602, subdivision (b) should be interpreted to extend immunity only for direct physical injuries and not for emotional harm. They provide no authority for such a narrow interpretation of the term "injury." Their reliance on Garcia v. State of California, (1967) 247 Cal.App.2d 814 is misplace. That case involved the narrow interpretation of a public entity's statutory immunity

from prisoner lawsuits, holding a prisoner's heirs might still bring a cognizable wrongful death action. The decision was based on the plain language of the statute and the underlying legislative intent, and did not involve any narrow interpretation of the work "injury." (Id., at p. 816.)

Without evidence of any legislative intent supporting the Howes' interpretation, it is unreasonable to read the statute to permit recovery only by those who suffer emotional harm.

IV

The Howes next challenge the constitutionality of the 1978 amendments on equal protection and due process grounds. They contend the

amendments violate the federal and state equal protection clauses because they discriminate against certain victims of crime and innocent minors. They assert that while most victims of crime may bring civil suit against the perpetrators, those injured by criminal bartenders may not. Furthermore, minors injured through their own intoxication may bring civil suit (see Chalup v. Aspen Mine Co. (1985) 175 Cal.App.3d 973), but young people harmed through no fault of their own may not. The Howes conclude the amendments create arbitrary classifications violative of equal protection guarantees. They are joined in their arguments by amicus curiae.

Our Supreme Court, however, has sustained the amendments against

similar equal protection challenges in Cory v. Shierloh, supra, 29 Cal.3d at pp. 437-441. That case is factually distinguishable, but its conclusions as to the statutes' constitutionality are controlling here. It is true that alcohol providers are accorded more favorable treatment than other criminals who are not immunized from civil liability; however, the Cory court concluded that the general rule of immunity for alcohol suppliers "is both founded upon a possible rational basis and reasonably related to a legitimate state purpose." (Id., at p. 440.) The Cory court also upheld section 25602.1's special treatment of minors harmed through their own intoxication, concluding "the Legislature might reasonably have

deemed [minors] more in need of safeguarding from intoxication than adults, because of the comparative inexperience of minors in both drinking and driving." (Id., at p. 441.) The court specifically noted the anomaly that an "obviously intoxicated minor, and those injured by him, retain a cause of action against the seller, but an adult consumer, and those similarly injured by him do not [citation]." (Id., at p. 440.) Nonetheless, the court's "function [was] to find, if possible, some means to sustain, not reflect, those amendments." (Ibid.)

Finally, the Howes argue that 1978 amendments violate the due process clause by creating an irrebuttable presumption that the consumption of

alcohol is the proximate cause of resulting injuries. They argue the issue of causation should not be taken from the fact-finder. Proximate cause, however, "is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts. [Citation.]" (Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal.App.3d 494, 509.) The Legislature has broad authority "to abolish tort causes of action" (Cory v. Shierloh, supra, 29 Cal.3d at p. 439.), as it did in the 1978 amendments.

Judgment affirmed.

NOT TO BE PUBLISHED.

SCOVILLE, P. J.

I CONCUR:

WALLIN, J.

SONENSHINE, J.

I reluctantly concur. I find the majority opinion persuasive. The Legislature did not intend for this cause of action to survive the most recent legislative amendments. And we cannot ignore legislative intent no matter how distasteful the result.

However, I suggest the Legislature reexamine this issue. Drunk driving is too dangerous in its results to be ignored. Those who are responsible for this evil should not be elevated to a special status which serves to shield them from liability.

S/SONENSHINE
SONENSHINE, J.

APPENDIX B

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

CASE NO. 47 52 19

JOSEPH HOWE et al.

v.

NORCHECK OF NEWPORT, INC. et al.

IT IS HEREBY ORDERED:

That the first amended complaint of JOSEPH AND DORIS HOWE against defendant NORCHEK OF NEWPORT, INC., dba WOODY'S WHARF AND ROBERT KINNEY be dismissed, pursuant to Code of Civil Procedure, Section 582(c)

S/Ronald L. Bauer

APPENDIX C

APPENDIX C

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G004468
S006827

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOSEPH HOWE et al.

v.

NORCHECK OF NEWPORT, INC. et al.

Appellants' petition for review

DENIED.

LUCAS
Chief Justice

APPENDIX D

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

No. G004468 (OCSC No. 475219)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

JOSEPH HOWE et al.

v.

NORCHEK OF NEWPORT, INC. et al.

TO EACH PARTY AND ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiffs Joseph Howe and Doris Louise Howe the above-named appellants hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Fourth Appellate District,

Division Three, affirming the dismissal of the complaint entered in this action on July 5, 1988. The Supreme Court of the State of California denied review on this case on September 21, 1988.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED: November 30, 1988

Paul G. Rees

RINTALA, SMOOT, JAENICKE & BRUNSWICK

By /S/
Robert A. Rees
Attorneys for Plaintiffs and Appellants Joseph Howe and Doris Louise Howe

APPENDIX E

APPENDIX E

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> "Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA BUSINESS & PROFESSIONS CODE §25602:

> "(a) Every person who sells . . . or causes to be sold . . . any alcoholic

beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of the intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this

section shall be interpreted so that the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313) and Coulter v. Superior Court (21 Cal.3d 144) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person."

CALIFORNIA BUSINESS & PROFESSIONS CODE §25602.1:

Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any

person who has suffered injury or death against any person licensed . . . pursuant to section 23300 . . . who sells . . . or causes to be sold . . . any alcoholic beverage . . . to any obviously intoxicated minor where the . . . sale . . . of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person."

CALIFORNIA CIVIL CODE §1714(b):

> "It is the intent of the Legislature to abrogate the holdings in such cases as Vesely v. Sager . . ., Bernhard v. Harrah's Club . . ., and Coulter v. Superior Court . . . and to reinstate the prior judicial interpretation of this

section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person."